No. 79-1517

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERATED DEPARTMENT STORES, INC., and SAKS & COMPANY,

Petitioners,

v.

MARILYN MOITIE and FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS*

The court of appeals in this case carved out a novel exception to the application of res judicata in multiple-party, multiple-action litigation, which seriously impairs the finality of judgments and the effectiveness of judicial control in this particularly troublesome class of cases. Respondent has presented no arguments for affirmance of the court of appeals' decision, and, we submit, there is no valid support for that decision. As both courts below found, the traditional standards of res judicata interdict the piecemeal litigation attempted by respondent here. The exception to the application of these well established standards adopted by the court of appeals not only is unprecedented and unjustified, but it does

* The statement required by this Court's Rule 28.1 appears on the first page of the Brief for Petitioners.

violence to the fundamental precepts underlying the res judicata doctrine.

The relevant facts and the issue presented in this case may be simply stated: Following the district court's dismissal of respondent's first complaint charging petitioners with antitrust violations in Southern California ("*Brown I*"), along with the dismissals of several other complaints all alleging violations in Northern California ("the *Weinberg* cases"), respondent made a deliberate decision not to appeal. Instead, he sought a different forum and filed a duplicative complaint ("*Brown II*"), which was practically a verbatim copy of his prior complaint, alleging the same transactions and occurrences, in the same time period and geographic area, and resulting in the same injury.[1]

The court of appeals expressly recognized that, considering solely the actions taken by respondent without regard to those of the *Weinberg* plaintiffs, "strict application of the doctrine of *res judicata*" would require dismissal of respondent's second complaint. (J.A. 218.) Nevertheless, the court of appeals held that respondent could escape the bar of res judicata and resurrect his dismissed action solely because the unrelated plaintiffs had appealed from the dismissals of their separate complaints in the *Weinberg* cases and had obtained reversals, in those separate, earlier appeals. The only question presented by the petition for certiorari is the validity of this novel exception to the well established principles of res judicata.

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[1] Respondent acknowledges, as he must, that both his complaints allege the same conduct by petitioners; that both seek recovery for an invasion of plaintiff's same "interest in personalty"; and that, in both complaints, "[t]he claim of injury is the same." Brief for Respondents at 12. *See* Brief for Petitioners, Appendix A, listing the allegations of *Brown II* which are exact or nearly exact copies of those of *Brown I*.

Respondent has made no attempt whatever in his brief in this Court to defend the court of appeals' holding in his favor. Respondent's failure to offer any authority for affirming the decision below — indeed, his failure even to ask for affirmance — demonstrates the baselessness of that decision. The court of appeals' ruling is unprecedented and erroneous. If allowed to stand, it would seriously erode the doctrine of res judicata, particularly in cases of the sort involved here — multiple actions involving multiple parties generated by federal government actions — the very class of cases where the stabilizing influence of res judicata and other tools of judicial control are most sorely needed.

Apparently unable to conjure up support for the court of appeals' ruling, respondent has instead sought to revive the argument that — notwithstanding the essential identity of both his complaints — he was entitled to split his claim and to institute his second action simply by pleading legal theories that he could have asserted but chose not to include in his earlier dismissed complaint. There is no occasion for this Court to consider this stale contention, which was rejected by both courts below.[2] In

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[2] The same district court which had dismissed *Brown I* applied res judicata to *Brown II* after "an extensive review and analysis of the origins and substance of" the *Brown* complaints, in which it found that "[a]rtful pleading" by respondent in *Brown II* did not alter its essential character and "similar identity" to *Brown I*. (J.A. 187, 192.) Such findings, which were affirmed by the court of appeals (J.A. 217), are not reviewed in this Court. *See Maher* v. *Gagne*, 100 S. Ct. 2570, 2575 (1980); *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 235 (1949). This Court also does not ordinarily review questions, such as that argued in respondent's brief, that were not raised in the petition for certiorari or by cross-petition. *See F. D. Rich Co.* v. *Industrial Lumber Co., Inc.*, 417 U.S. 116, 121 n.6 (1974); *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 421 (1972).

any event, as we discuss below, respondent's assertion that his carbon-copy second complaint is not barred by res judicata because it pleads state law theories which were not expressed in his prior complaint is squarely contrary to established law. *See, e.g., Allen* v. *McCurry,* 101 S. Ct. 411, 414-15 (1980); *Nash County Bd. of Educ.* v. *Biltmore Co.,* [1980-81] Trade Cas. (CCH) ¶ 63,715 at 77,816-18 (4th Cir. 1981) (judgment in state court suit for price fixing based on state antitrust law bars subsequent action in federal court for the same conduct based on federal antitrust law).

I. Respondent Has Not Attempted To Defend the Court of Appeals' Holding in His Favor.

The only reason why the court of appeals reversed the district court's dismissal of respondent's second complaint on the ground of res judicata — and the only issue presented to this Court in the petition for certiorari — was the court of appeals' determination that, notwithstanding respondent's deliberate decision not to appeal the judgment dismissing his first complaint, res judicata should not apply to that judgment where other parties, in separately filed actions against petitioners, obtained a reversal on their appeals from the judgments against them. Significantly, respondent has presented no arguments in support of this holding.

Respondent makes no attempt to advocate the novel legal doctrine on which the decision below in his favor was predicated. He does not even mention any of the cases relied upon by the court below. Nor does he offer any other authority or rationale to sustain the loophole in the application of res judicata which the court of appeals carved out for multiple party litigation, such as that involved here.

It is noteworthy that nowhere in respondent's brief does he contend that the decision below should be affirmed. This request is most conspicuously absent from the brief's "Conclusion" (Brief for Respondents at 31) wherein he is called upon by the Court's rules to specify "with particularity the relief to which the party believes himself entitled."[3] Sup. Ct. Rule 34.1(j).

The inescapable fact is that there is no valid support for the court of appeals' unprecedented deviation from what that court itself recognized as the norm of "strict application of the doctrine of *res judicata*." (J.A. 218.) The decisions of this Court, supported by the fundamental policies of fixing clear-cut terminal points for litiga-

[3] Respondent's "Conclusion" asks that the district court be directed to grant respondent's motion to remand his case to municipal court, but the issue of remand was not presented in the petition for certiorari and respondent filed no cross-petition. Moreover, respondent's brief does not even refer to the applicable removal statutes much less discuss any of the extensive authorities dealing with removal of actions in general or, in particular, with removal of cases in a multiple-action antitrust litigation or following a prior federal judgment in an essentially identical predecessor action. There is no basis for this extraordinary relief which respondent now so casually requests. In any event, there is ample authority for the district court's denial of remand, which the court of appeals expressly affirmed. Multiple grounds for removal were present here. *See, e.g., Hughes Construction Co., Inc.* v. *Rheem Mfg. Co.*, 487 F. Supp. 345 (N.D. Miss. 1980) (diversity of citizenship removal); *Lee's Prescription Shops, Inc.* v. *Chas. Pfizer & Co., Inc.*, [1970] Trade Cas. (CCH) ¶ 73,180 at 88,660 (S.D.N.Y. 1970) (same); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79, 82-83 (E.D.N.Y. 1980) (federal question removal based on needs of coordinating multiple antitrust cases following federal government action); *Three-J Farms, Inc.* v. *Alton Box Board Co.*, [1979-1] Trade Cas. (CCH) ¶ 62,423 at 76,549-50 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980) (same); *Villarreal* v. *Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) (removal authorized because filing of second action in state court presented federal question issues as to the scope and possible circumvention of prior federal judgment).

tion and effective administration of justice, mandate that a party, like respondent, who makes a "voluntary, deliberate, free, untrammeled choice . . . not to appeal" from an adverse judgment is bound by that judgment under res judicata, even if a closely related judgment is subsequently reversed on appeal. *Ackermann* v. *United States,* 340 U.S. 193, 200 (1950); *Reed* v. *Allen*, 286 U.S. 191 (1932).

This rule is all the more applicable where, as here, no such closely related or "interwoven" judgment is involved. All the *Weinberg* cases, whose reversal was relied upon by the court of appeals, involved Northern California, whereas the complaint at issue here solely involved Southern California — a different market, with different stores and different economic factors, and an area not included in the antecedent federal government actions.[4]

Moreover, the decision below — by casting doubt on the finality of unappealed judgments — seriously undermines the ability of federal courts to coordinate and control proceedings in complex multiple actions with multiple parties. Such judicial control is essential to the effective administration of this inherently problematic class of cases. We do not agree with respondent's characterization that this is a "hard case" (Brief for Respondents at 6), but assuredly the decision below makes "bad law." It should not be allowed to stand.

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[4] There is absolutely no support in the record for respondent's bald assertion that "the pricing practices of the [petitioners'] Northern and Southern California operations are integrated." Brief for Respondents at 2, n.1. In fact, throughout the period covered by respondent's complaint and at the present time, each of the petitioners' respective pricing structures for women's clothing in Northern and Southern California have been different.

II. Respondent's Contention That *Brown II* Is Not Barred by Res Judicata Because It Pleads State Law Theories Not Asserted in *Brown I* Is Without Merit.

The principal asserted difference between the complaints in *Brown I* and *Brown II* is in the legal theories pleaded. *Brown I* referred to the Sherman Act, Section 1, 15 U.S.C. §1 (1976) (J.A. 9); whereas *Brown II* referred to state law theories of unfair competition, fraud and restitution. (J.A. 99-101.) Brief for Respondents at 4, 13. In this Court, respondent argues that both the district court and the court of appeals erred in rejecting his assertion that — solely because of this ostensible change in legal theories — the final judgment dismissing *Brown I* should not bar *Brown II* on the ground of res judicata. This issue is not properly before this Court (*see* n.2, *supra*), but even assuming *arguendo* that it were, respondent's contention is patently without merit.

Respondent does not, and cannot, dispute the fact that none of the theories pleaded in *Brown II* alters the gravamen of his complaint, which was the same in *Brown I* — namely, a claim of overcharges resulting from a price-fixing conspiracy. The same alleged conduct, parties, time periods and geographic areas are involved in both complaints. Nor does respondent contest the fact that the state law theories asserted in *Brown II* could have been pleaded in *Brown I*.[5] Respondent could have but did not assert these theories either in the brief

[5] Respondent's counsel offers no explanation for omitting state theories from his complaint in *Brown I*. This omission is particularly striking in view of the fact that the same counsel contemporaneously filed a complaint in *Moitie I* asserting only state law theories. *See* Brief for Respondents at 4. The subsequent filing of both *Brown II* and *Moitie II* (asserting yet other state law theories) dramatically points up counsel's deliberate strategy of fragmenting his claim into divergent theories of recovery in an attempt to preserve multiple options.

or during oral argument to the district court in opposition to petitioners' motion to dismiss *Brown I* under Rule 12(b)(6). Respondent could have but did not amend his complaint in *Brown I* expressly to include these theories. Moreover, he could have but did not seek reconsideration of the dismissal, under Rule 60(b) or otherwise; he could have but did not request the district court to rule that the dismissal was without prejudice with respect to any state law theories; and he could have but did not appeal from the district court's final judgment.

In effect, respondent kept his state law theories in his back pocket while he litigated actively in the district court on his first complaint. When he lost in that court, he deliberately chose to break away from the other plaintiffs, who did appeal, and to start over again by asserting the same basic claim, in thinly disguised form, in a different forum. As both courts below correctly concluded, this is a hornbook case for the application of res judicata.

No principle is more firmly established than the rule that a final judgment binds the parties thereto "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but *as to any other admissible matter which might have been offered* for that purpose." *Commissioner* v. *Sunnen,* 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac,* 94 U.S. 351, 352-53 (1877). (Emphasis supplied.)[6] As Mr. Justice Holmes stated in *United States* v. *California & Oregon Land Co.,* 192 U.S. 355, 358 (1904):

> [T]he whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his

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[6] *See, e.g., Allen* v. *McCurry,* 101 S. Ct. at 414; *Brown* v. *Felsen,* 442 U.S. 127, 131 (1979); *Montana* v. *United States,* 440 U.S. 147, 153 (1979).

> whole case at one time. He cannot even split up his claim . . . and, *a fortiori,* he cannot divide the grounds of recovery.[7]

Respondent cannot evade the established principles against claim-splitting and piecemeal litigation by general invocations of "federalism." Brief for Respondents at 7, 11, 14. The underlying policies of finality of judgments, relief from multiple lawsuits, and conservation of judicial resources preclude piecemeal litigation not only where all the actions involved are before the same court or within the same judicial system, but also where there is an attempt to split a claim between the courts of different states or between state and federal courts.[8] The courts have recognized that two actions for the same injuries allegedly resulting from the same price-fixing conspiracy — such as *Brown I* and *Brown II* — both assert the same claim, for purposes of res judicata, even where one action is based on a state statute and the other on the federal antitrust laws. *E.g., Nash County Bd. of Educ.* v. *Biltmore Co.,* [1980-81] Trade Cas. (CCH) ¶ 63,715 at 77,816-18 (4th Cir. 1981); *Englehardt* v. *Bell & Howell Co.,* 327 F.2d 30, 32-34 (8th Cir. 1964) (plaintiff's dismissal of suit brought under state antitrust law barred later action under Sherman Act); *Ford Motor Co.* v. *Superior Court*, 35 Cal. App. 3d 676, 679, 110 Cal. Rptr. 59, 61 (1973) (final judgment in Sherman Act case barred subsequent suit under California antitrust law). In such cases, the concept of "federalism" does not even

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[7] *See also, e.g., Baltimore Steamship Co.* v. *Phillips,* 274 U.S. 316, 319-22 (1927); *Acree* v. *Air Line Pilots Ass'n,* 390 F.2d 199, 201 (5th Cir.), *cert. denied,* 393 U.S. 852 (1968); *McCarthy* v. *Noren,* 370 F.2d 845, 847 (9th Cir. 1966), *cert. denied,* 387 U.S. 917 (1967); *Williamson* v. *Columbia Gas & Electric Corp.,* 186 F.2d 464, 470 (3d Cir. 1950), *cert. denied,* 341 U.S. 921 (1951).

[8] *See, e.g., Allen* v. *McCurry,* 101 S. Ct. at 415; *Montana* v. *United States,* 440 U.S. at 153.

prevent a federal court from enjoining "a state proceeding which is precluded under the doctrine of *res judicata.*" *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) (enjoining plaintiffs from proceeding on state law theories which could have been, but were not, presented along with federal antitrust claims upon which final judgment was entered). Certainly, a federal court is not prevented from applying res judicata to protect the authority of its own judgments against circumvention by the refiling of the same claim camouflaged by the trappings of state law theories, as respondent attempted to do here.

Nor can respondent elude the principles of res judicata by indulging in what is, at best, a speculative assertion that, *if* he had presented his state theories in *Brown I*, the district court would not have considered them. *See* Brief for Respondents at 6, 14-15. This assertion is based upon respondent's incomplete quotation of a note to an illustration of a comment on the general rule against splitting a claim, set forth in RESTATEMENT (SECOND) OF JUDGMENTS §61.1, Reporter's Note to Illustration 10, Comment e at 178 (Tent. Draft No. 5, 1978). Brief for Respondents at 20.

The RESTATEMENT (SECOND) Reporter's Note states as follows:

> Illustration 10 is representative of cases in which it is open to a plaintiff, commencing an action in a federal court, to advance a theory based on state law as well as a theory based on federal law, and he omits the state theory. The plaintiff cannot maintain a second action in state court on the same transaction in which he attempts to advance the theory earlier omitted. *Id.* at 178.

Plainly, this sound principle supports the application of res judicata in this case. Respondent purports to rely on a further statement in the foregoing Reporter's Note to the effect that "[i]f *in a given case it is clear*" that the federal court would have exercised its discretion to decline pendent jurisdiction over the state law theories, under the general criteria set forth in *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), only then "the state action should not be barred." *Id.* at 179. (Emphasis supplied.) However, respondent omits from his brief the next sentence in this Note, which states:

> But *in cases of doubt*, it is appropriate for the rules of res judicata to compel the plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit. *Id.* at 179. (Emphasis supplied.)

Even accepting *arguendo* the validity of the proposition embodied in the partial quotation of the Reporter's Note relied upon by respondent, this is not a case where "it is clear" — either as a matter of law or on the particular facts presented — that the district court would not have considered respondent's state theories had they been explicitly pleaded in *Brown I.*

It is not the law, as respondent contends, that a district court *must* dismiss state theories whenever they are pendent to a federal claim which is dismissed prior to trial. On the contrary, this Court and the courts of appeals have made clear that the pretrial dismissal of a jurisdiction-conferring federal claim does not deprive the federal courts of their power to entertain pendent state

claims. *See Rosado* v. *Wyman*, 397 U.S. 397, 402-05 (1970);[9] *Arizona* v. *Cook Paint & Varnish Co.*, 541 F.2d 226, 227 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977) (court could decide state tort claims following pretrial dismissal of federal antitrust claims); *Brunswick* v. *Regent*, 463 F.2d 1205, 1206-07 (5th Cir. 1972) (court could decide state contract claim following plaintiff's abandonment of federal securities law claims); *Gem Corrugated Box Corp.* v. *National Kraft Container Corp.*, 427 F.2d 499, 501 n.1 (2d Cir. 1970) (court could decide state contract claims following pretrial dismissal of federal antitrust claims).

The hallmark of pendent jurisdiction, like other tools of efficient judicial administration, is district court discretion. *Rosado* v. *Wyman*, 397 U.S. at 402-05; *Webb* v. *Bladen*, 480 F.2d 306, 308-10 (4th Cir. 1973). It is for the court, and not the plaintiff, to decide whether any pendent state law theories which the plaintiff wishes to preserve should be litigated in the federal forum. By holding back his present state law theories during the pendency of his original action, respondent effectively deprived the district court of an opportunity to exercise its discretion whether or not to adjudicate those theories.

Respondent was obligated to plead at one time all the theories he wished to preserve. Having deliberately chosen to withhold certain theories, he must bear the

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[9] In *Rosado*, the jurisdiction-conferring constitutional claim had become moot within less than three weeks after the federal court had held a hearing on that claim. 397 U.S. at 400. Even in these circumstances, this Court noted that "the extent of the investment of judicial energy" was a factor supporting the maintenance of federal court jurisdiction over the entire case. 397 U.S. at 403. In the litigation involved here, there were extensive briefing and oral arguments, and the seven private actions involved were pending for nearly nine months prior to their dismissal.

consequences of his tactical decision. Respondent cannot now proceed on the speculative assumption that, had he previously proffered his theories, the district court would not have considered them. *See, e.g., Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d at 1312-15.

Moreover, in the circumstances involved here, it is more reasonable to assume that, at the time it dismissed *Brown I*, the district court would have and did entertain and dispose of all the theories, both state and federal, that were presented to it. Respondent acknowledges that at the time it dismissed *Brown I*, "[t]he district court . . . was aware of the nature of . . . [respondent's] potential pendent claims as the *Moitie* complaint [filed by the same counsel] was framed entirely in terms of state-law claims for unfair competition and anti-competitive practices." Brief for Respondents at 4. In fact, two of the seven complaints originally before the district court were framed in terms of state law theories.[10] Petitioners had argued in support of their motion to dismiss respondents' original actions and the *Weinberg* cases under Rule 12(b)(6) that the same criteria with respect to damages and injunctive relief apply to both the federal and state law theories asserted by the

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[10] In addition to *Moitie*, state antitrust and unfair competition law was pleaded as the basis for *Musser* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-1363-SW, originally filed in the California Superior Court in San Francisco on June 11, 1976. That case was removed to the district court on grounds of federal question and diversity of citizenship jurisdiction on July 1, 1976. Musser moved to have her action remanded to state court, but this motion was not granted, and the *Musser* complaint, like all the other pending actions against petitioners, was dismissed "in its entirety" on January 11, 1977. (J.A. 88.) Unlike plaintiffs Moitie and Brown, however, Musser joined the other *Weinberg* plaintiffs in appealing from this judgment.

various plaintiffs. The district court dismissed all seven complaints "in their entirety." (J.A. 90; J.A. 88.) Under these circumstances, there is no basis for assuming that the district court which dismissed *Brown I* — and subsequently dismissed *Brown II* on the ground of res judicata — would not have exercised jurisdiction over all state law theories arising out of the underlying common factual allegations, had they been presented.[11]

The principles espoused by respondent — and soundly rejected by both courts below — would foster claim-splitting and piecemeal litigation.[12] Instead of bringing all their theories in a single action, plaintiffs would be encouraged to hold some legal theories in reserve, hoping for a second bite at the apple if their initial line of argument is rejected. Rather than affording the district courts the opportunity to exercise sound discretion in the management of actions before them, respondent's approach would result in sidestepping the courts, circumventing their discretion, and undermining the salutary doctrine of res judicata. Such a result is contrary to "the whole tendency of [this Court's] decisions" dating back even prior to the modernization of federal procedure. *United States* v. *California & Oregon Land*

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[11] Even if the court had chosen not to exercise pendent jurisdiction, it could have proceeded on the basis of diversity of citizenship.

[12] In addition to his spurious "federalism" and pendent jurisdiction arguments, respondent appears to contend that the judgment dismissing *Brown I* was not res judicata because he had filed that action in a "court of limited jurisdiction." *See* Brief for Respondents at 6, 14-15. But it has long been settled that "a litigant cannot avoid the impact of the rule against splitting causes of action by choosing for his first foray a tribunal of limited jurisdiction." *City of Los Angeles* v. *Superior Court*, 85 Cal. App. 3d 143, 151, 149 Cal. Rptr. 320, 324 (1978); RESTATEMENT OF JUDGMENTS §62, Comment j at 254 (1942).

Co., 192 U.S. at 358. Even if such tactics could ever be tolerated, they plainly cannot be permitted in the context of multiple-party, multiple-action litigation, which typically follows in the wake of federal government proceedings, and which urgently requires effective judicial control, such as that exercised by the district court in this case.

CONCLUSION

For the foregoing reasons and those stated in the Brief for Petitioners, the decision of the court of appeals in this case should be reversed and the complaint should be dismissed on grounds of res judicata.

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